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No. 74-1337

In the Supreme Court of the United States

OCTOBER TERM, 1975

CALVIN D. RAHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that certain evidence admitted at his trial either was discovered during a search conducted without probable cause or was the fruit of an unlawful search.

After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of having converted to his personal use property belonging to the United States, in violation of 18 U.S.C. 641.[1] He was sentenced to a term of six months' imprisonment, to be followed by a term of three and one-half years' probation, and was fined $2,000. The court of appeals affirmed (Pet. App. A).

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[1]Petitioner was acquitted of having knowingly and willfully submitted a false document to a federal agency, in violation of 18 U.S.C. 1001 (Pet. App. A, pp. 13-14).

The evidence introduced in connection with petitioner's motion to suppress established that on July 10, 1973, Inspector Jackie Neal of the Alcohol, Tobacco & Firearms Bureau (ATF) in Denver, Colorado, submitted an affidavit to a United States magistrate in support of an application for a warrant to search petitioner's residence. Petitioner was at that time employed as an ATF special agent in Denver. The request for the search warrant resulted from and was part of an investigation by the ATF inspection service into the suspected conversion of government property by ATF agents (Pet. App. A, p. 13).

The magistrate issued the warrant on July 10, 1973, and it was executed on July 13. During the search of petitioner's home, six weapons belonging to the government, and also a written list of weapons, were found and seized. ATF Regional Director Billy Gaunt also telephoned petitioner, who was then vacationing in Minnesota, on July 13 and ordered him to return to Denver to meet with ATF investigators. Petitioner returned to Denver on July 14 and was met at the airport by Jim Duff, his immediate supervisor. In petitioner's possession at the time were seven firearms that he had previously certified as having been destroyed. Petitioner subsequently turned these firearms over to ATF investigators and made a lengthy incriminating statement (Pet. App. A, pp. 13-14).

1. Petitioner's basic contention (Pet. 8-10) is that the affidavit supporting the request for a warrant to search his residence relied upon facts too remote in time to establish probable cause for the search.

Inspector Neal stated in the affidavit that on July 9, 1973, petitioner's former supervisor, Karl Terlau, had admitted in an interview with ATF investigators that he and petitioner had agreed to disobey their orders to destroy some of the weapons that had been seized from

Robert Nelson in September 1969, and instead to keep several of the weapons. Terlau had stated further that he could not remember which weapons petitioner had taken, but that he remembered that petitioner had commented at the time that several of the weapons were "too nice to destroy, and would be worth much more money if kept for several years" (Pet. 5).

Inspector Neal also recounted in the affidavit that Terlau had confessed that he had sold to a pawnbroker the weapons that he had taken. Neal stated that he had checked with two pawnbrokers in Denver and had looked at the pawnshop records of the Denver Police Department but that he had not discovered any weapon sales by petitioner. Neal also stated that Special Agent Carl Newton had told him that in the fall of 1971 he had seen petitioner using a Browning over/under 12-gauge shotgun identical to one Newton had seen earlier in the ATF vault. Newton had observed petitioner remove the weapon from a tan suede case, which had appeared to Newton to be the same case that he had seen in the vault (Pet. 4-6).

In arguing that the representations made by Inspector Neal in his affidavit did not give ATF investigators probable cause to search his home, petitioner places primary emphasis upon the fact that the request for the warrant followed by approximately twenty months most of the events relied upon to justify the search. The only information relating to more recent events, according to petitioner, concerned the results of Inspector Neal's investigation of pawnshop transactions, which had revealed that petitioner probably had not pawned any of the weapons in Denver. But the existence of probable cause for a search "cannot be quantified by simply counting the number of days between the occurrence of the facts relied upon and the issuance of the affidavit." *United States* v. *Johnson*, 461 F.2d 285, 287 (C.A. 10). The lapse

of time between the occurrence of the facts relied upon and the request for the search warrant, while important, is only one of the factors to be considered in determining whether probable cause exists. *Ibid.*; see also *Irby* v. *United States*, 314 F.2d 251, 254 n.* (C.A. D.C.), certiorari denied, 374 U.S. 842. Furthermore, the existence of probable cause cannot be determined merely by matching the lapse of time in this case with the lapse of time in other cases. See *Hefferman* v. *United States*, 50 F.2d 554, 556 (C.A. 3). Rather, each case must be decided in light of the particular circumstances presented. See *United States* v. *Harris*, 482 F.2d 1115, 1119 (C.A. 3); *United States* v. *Johnson, supra*; *United States* v. *Guinn*, 454 F.2d 29, 36 (C.A. 5), certiorari denied, 407 U.S. 911; *Irby* v. *United States, supra*.

The information presented to the magistrate in the present case was sufficient to establish probable cause for the search of petitioner's residence. As the court of appeals noted (Pet. App. A, p. 16):

> Newton's account indicates [that petitioner] had appropriated at least one of the weapons for his personal use. This appropriation combined with the comment Terlau remembered that [petitioner] believed the weapons would appreciate in value would give more than a suspicion [that petitioner] still possessed the weapons. The investigation, although far from extensive, disclosed [that petitioner] apparently had not disposed of the weapons in the manner Terlau had utilized. [Emphasis omitted.]

Moreover, the affidavit contained sufficient information to justify the magistrate's conclusion that probable cause existed for the search of petitioner's residence, rather than of some other place. Again, as noted by the court of appeals (Pet. App. A, p. 18):

> The affidavit, as we have determined, gave probable cause to believe [that petitioner] still possessed the weapons. The affidavit contained the report indicating [that petitioner] had used one of the weapons for hunting purposes. The statement concerning the guns' appreciation potential indicates [that petitioner] would have given some care to their storage. As Chief Judge Arraj stated, in denying the original motion to suppress: "It is reasonable to assume that his house was where he kept things and it is pretty normal I believe for individuals to keep weapons in their homes, particularly hunting weapons and weapons which may be kept for the safety of the family." Here an ATF agent was believed to possess the weapons; certainly, he would not have had the weapons at his office. Admittedly there are other places where the guns *might* have been stored; yet, we believe these facts and circumstances gave the magistrate probable cause to believe the weapons would be found as a result of the search of [petitioner's] present residence. [Emphasis in original.]

2. Petitioner's further contention (Pet. 11) that his confession and the weapons that he turned over to ATF investigators upon returning from Minnesota to Denver should have been excluded from his trial because of their relationship to the unlawful search of his residence must, of course, be rejected if the search itself is held to have been lawful. But the confession and the weapons brought by petitioner from Minnesota would have been admissible in any event.

There is nothing in the record to suggest that petitioner's confession was coerced. It is undisputed that petitioner, a veteran law enforcement officer, was fully advised of his rights before he confessed to having converted some of the weapons he had been ordered to destroy (Pet. 7; II Tr. 12; IV Tr. 75). It is true that the search of petitioner's resi-

dence had occurred prior to his admitting that he had converted the weapons to his personal use, but he also knew at the time that his former supervisor, Karl Terlau, had admitted his own involvement in the conversion of the weapons and had disclosed the fact of petitioner's involvement. Petitioner's confession therefore had a basis independent of the evidence discovered during the search of his residence. See *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392; *United States* v. *Cox*, 459 F.2d 986, 987-988 (C.A. 5).

There is similarly no evidence in the record to suggest that petitioner's decision to return the weapons that he brought with him from Minnesota was coerced or that it was related to the search of his residence.[2] *Brown* v. *Illinois*, No. 73-6650, decided June 26, 1975, slip op. at 9-13. Moreover, petitioner did not move to suppress these weapons and he is thus foreclosed from belatedly objecting to their admission into evidence even if their discovery did result from a prior unlawful search. *United States* v. *Ellis*, 461 F.2d 962, 968-969 (C.A. 2), certiorari denied, 409 U.S. 866.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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[2]There was conflicting evidence concerning whether petitioner was informed by Billy Gaunt on July 13 that his residence had been or was about to be searched (I Tr. 168; II Tr. 111; III Tr. 33-35, 132-133; IV Tr. 25-26). Petitioner has never claimed, however, that Gaunt asked him to bring any weapons he had with him in Minnesota back to Denver or, indeed, that Gaunt had any reason to believe that petitioner had any of the stolen weapons with him in Minnesota.